OBSERVATIONS

ON THE

PRINCIPLES AND TENDENCY

OF THE

County Courts Act.

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OBSERVATIONS, ETC.

WHEN the last County Court Act was in progress through Parliament, if any lawyer ventured upon observations, either in the form of objection or advice, he was clamoured down by the cry that he was an interested person, whose object was to maintain existing abuses, and oppose a measure destined to diminish his professional emoluments. Thus it was that the experience calculated for the discussion of such a subject was excluded from its consideration, and those who were best able to give counsel, and to shape enactments into useful and beneficial instruments, were shut out by base and sordid insinuations. The result is, that we have now a statute which, both in respect of its principles and its details, is as perfect a mistake of legislation as anything that could be pointed out by Lord Coke in that legislature which he has signalised as the *Parliamentum indoctum* of his time. With its details it is not intended here to meddle, but reflections on some of its general principles may lead to a more accurate appreciation of the whole statute, and a more correct conception of what is really wanted, and would be truly beneficial.

Cheap law for the recovery of debts has been throughout every discussion of the County Courts Acts, both in Parliament and out, assumed to be a boon, and a requisition of the creditor's. The hardship of exposing a man to the necessity of incurring a long bill of costs to obtain a legal remedy, and the assistance of a judicial screw to be put in force against a

person who has already shown himself unwilling, or unable to pay his debt, and has thereby foreshadowed the event indicated in the expression of " throwing good money after bad," is a topic which lies upon the surface, and the first, and sometimes the only one encountered. Those who have rested their considerations upon it, (and they are the great majority,) have but a limited acquaintance with the working of such matters.

Creditors are not so terrified by the idea of costs as the argument assumes: they have, many of them, a son, or nephew, or cousin bred up in an attorney's office, just admitted, and with little or no private means of livelihood, deeply anxious to *make* business. By way of giving him a start, the affectionate relative affords him the *loan* of a few debts, which having been outstanding a sufficient length of time to warrant the conclusion that no loss of trade or patronage need be dreaded in the quarter from which they are owing, are culled from the ledger, and delivered over to the neophyte to try his hand upon. Sometimes it is a part of the arrangement that the creditor is to guarantee costs out of pocket; it as often happens that the attorney is to stand to all risks, and, if successful, to pay the recovered debt to the employer, and hug himself in the enjoyment of the taxed costs. Another plan adopted for the purpose of generating business, is, for the attorney, if he have a little capital, to embark it in the *purchase* of debts, and these having become his own property, with the privilege of suing in the creditor's name, form the materials out of which a long array of costs are to be extracted. There is yet another system which, however incredible, does exist to no small extent. It is not an unusual thing for the attorney to pay the creditor a per centage on all costs recovered, on the condition that the creditor shall employ him to sue all his dilatory debtors. A friend of the writer's, being one day in the office of one of such attorneys engaged in conversation with him, was interrupted by the entrance of a person who came in to make or obtain some communication. As he was going out, the attorney called him back, saying to him, " By the bye, Mr. ——,

whom do you employ now?" "Oh," replied the other, "I employ Mr. So and So." "And how much does he allow you?" "Ten per cent." was the answer. "Come to me," said the attorney, gently slapping him on the breast with the back of his hand, and winking cunningly at him, "Come to me, and I will give you twenty." It was a singular naïveté in the senator who, in the debate on the "optional" clause, expressed his conviction that no attorney would hazard the interests, or the favour, of his employer by suing in the superior courts for a debt which was a proper subject for the county courts. With all the facts above related, it is too much to be apprehended that a large proportion of creditors have an interest, either directly, or reflectively, in the expense of suits in the superior courts. And this apprehension is strengthened by a recurrence to the actual incidents which immediately followed the passing of the first statute. Bills of exchange and promissory notes under 20*l.* were sued for in the superior courts, under the notion, that being contracts of a strictly transitory character, transferred by indorsement, and existing with the holder wherever he might be at the moment they became due, there was no particular jurisdiction of any one county court which could be said to have cognizance of them. At first sight, one would be disposed to imagine that this was a legal difficulty, in which the act was defective, and by which the creditor was a sufferer. But no one can doubt that it originated in the ingenuity of the attorney, when it is known that, as soon as that difficulty was removed, recourse was had to another device to authorize resorting to Westminster Hall for redress. An attorney brought an action in his own name in a superior court for a debt under 20*l.*, and raised the question whether there was anything in the act which deprived an attorney of his common-law privilege of suing in the court of which he was a member, and in which, by not altogether a fiction of law, he was always supposed to "live and move and have his being." The decision being in his favour, immediately all holders of bills of exchange and promissory notes under

20*l.* indorsed them to their attorney, in whose name the action was brought in the superior court.

With a knowledge of all these facts, surely the creditor is not the only person for whose exemption from the risk of costs ingenuity is to be taxed, and towards which object legislatorial deliberation is to be confined. The debtor is certainly not less interested in the subject than the creditor; but a debtor is supposed to have no claim for sympathy. His own conduct has supplied the artillery which may be levelled against him, and there is but one question worth asking before that artillery is put in action,—whether he is worth powder and shot? But with the full concession that there are numbers fraudulent, or selfish enough to run into debt without the prospect or the design of payment, there are hundreds in the length and breadth of the land whose path, early inexperience, ill-fated imprudence the mere effusion of buoyant youth, or feelings for another's difficulties, moving a too pliant disposition, and impelled by a too thoughtless confidence in distant prospects, have beset with crags and thickets through which the future journey of life is a perpetual and heart-wearing struggle. And with such men a struggle it will continue to the end,—for awakened to their mistakes in riper years, and by woeful experience, and even in the course of their errors imbued with principles of honour, they will go on striving, and striving, with the deepest yearnings of the soul for extrication, but will as constantly be driven back by that frightful system of law.

> Optat quietem Pelopis infidus pater,
> Egens benignæ Tantalus semper dapis;
> Optat Prometheus obligatus aliti;
> Optat supremo collocare Sisyphus
> In monte saxum: *sed vetant leges* Jovis.

But after all, the subject is a serious one. How many a noble spirit has been broken,—how much of genius, how much of industry, how much of energy, which might have immortalized their possessor, and have diffused blessings

over countless generations, have been squandered, and dissipated, and wasted by ceaseless efforts to exorcise that ever-haunting spectre! Surely these are worthy considerations, and not improper objects of a legislator's care. But Heaven forbid that in this community—in commercial England,—in which with as much truth there may be said to flourish "Merchant Princes" as could ever have been said of that proud republic which once spread its arts and its arms, its commerce and its victories over the wave of the Adriatic—which counts amongst its shopkeepers men of spotless integrity, enlightened intellect, and pure and lofty minds,—Heaven forbid that the instances, which have been singled out for the purpose of considering this subject in all its bearings, should be characteristic of the mass. And whilst it is to be lamented that so many men, from one or two false steps, should have placed themselves in the troubles which that system of "cost-making" eternally renews, and who stand as it were on an ever-revolving wheel, which in the course of its revolutions brings them constantly within reach of plucking emancipation, but which, before that can be grasped, as constantly whirls them again into a downward course, without the longed-for prize being snatched; it also is too true that recklessness, selfishness, extravagance, and fraud are in many, many instances the materials of that pile of debt against which every right-minded man's aversion is excited, and which is regarded as an odious incumbrance, to destroy which every engine may be directed, though the worthless architect who erected it be himself buried in its ruins. The "sharp attorney," too, (who has been for the same purpose referred to,) is, thank Heaven, not the exemplar of the whole body. Indeed there is no profession or calling in this country which is so distinctly divisible into two classes. An educated and honourable attorney justly occupies a high place in society. His knowledge is extensive and various, his principles are high and pure, his powers of good are only equalled by his will to wield them. He is the depository of important confidences, the resource of injured

innocence, a faithful adviser in difficult emergencies. Such a man well deserves the respect of the respectable, and he derives his support from the most honourable exertion of social duties, not seeking to draw his sustenance from the blood of the afflicted. But there is another class of attorneys, whose course in life is so far apart from his, that they may be almost said to belong to another profession. They are as the offspring of Ishmael—in their nature predatory, their hand is against every man, and they not unreasonably suppose the hand of every man is against them.

Before applying the mind to a consideration of the views which ought to be preserved in framing a statute like the County Courts Act, there are some other observations to be made, and some other principles to be ascertained. These being done, the understanding will be better prepared to comprehend the real wants of the community, and the best mode of supplying them. But there is one remark which (if it be allowed that all which has been said above is well founded) cannot fail to occur at this point of the case. It is quite clear that any measure which leaves it optional for the creditor to sue in the superior or in the inferior court, to run up large costs, or to obtain his judgment at small expense, according to his own discretion, must be a gross mistake. Such a mistake in the act under consideration is founded partly on the great blunder of regarding the question of costs as one only affecting the creditor, forgetting that they are accumulated on the head of the debtor, and forgetting or ignorant of the true state of things with reference to attorneys. Even allowing that there are debtors who deserve no compassion, and who might without scruple be left to the ruinous consequences of their own misdeeds, a creditor is not exactly the person to whom the selection of proper victims should be entrusted. Creditors, who are smarting under actual or anticipated loss, are not very nice or impartial in contrasting merits and demerits, in perceiving the force of palliations, or in distinguishing between recklessness and indiscretion. But the mistake is principally produced by a sense of the inadequacy of such a court to

determine satisfactorily many questions which must come before it, and the insufficiency of a court of appeal like that provided to supply the defect.

The last observation leads one to consider whether the *amount* of the debt is a correct guide for determining the tribunal before which it is to be brought; or whether the *nature* of it is not the true criterion. Legislators, especially if they be "country gentlemen," and more especially if they be county justices, have a supreme contempt for lawyers. The maker of laws does not readily comprehend how it is that the man, who is to assist in putting them in practice, should understand them better than himself. Generally, too, there is no great respect for the character of a mere lawyer. The refinements of his reasoning, the subtleties of his distinctions, and the impression of absurdity, and sometimes of injustice, made upon men's minds by the frequent results of his arguments, do not tend to make his fellow citizens regard him as an instrument of much utility in working out equity and right. With your lay magistrate, "substantial justice" is a favourite expression, which saves the fatiguing, and often impracticable task, of stretching the intellectual orb sufficiently to perceive niceties, and which may sometimes mean trying and convicting a prisoner for stealing apples, and passing a sentence of transportation upon him because he is suspected of being a poacher. Nevertheless, those subtleties and refinements are the inevitable result of a high state of freedom. It was said by a great French writer, that if a king could be found of perfect wisdom and perfect goodness, absolute monarchy would be the best form of government. This is a mere truism, and the advancement of it would be superfluous if no more was intended than to convey the proposition. But a truism, in morals as in mathematics, must be sometimes repeated to enable us better to comprehend the less obvious shades of truth as we wander from the axiom. Perfect wisdom and perfect goodness are to be found in no mortal man: how far then is it safe to place in the irresponsible hands of any one the protection of our liberties? If perfect wis-

dom and perfect goodness are not to be procured on earth, it is manifest that the degrees of both must vary in every individual; and with that variance "substantial justice" must assume an infinity of shapes and colours. It is a keen perception of all this which leads to the establishment of laws, which shall regulate rights and liabilities, and whilst they govern the subject, shall bind the monarch. It is plain, that the more the law is the overruling power, the more confined is the will of the sovereign. It is plain, that as you extend the dominion of law, you restrain the power of man over man. Liberty, in a state of society, really means no more than the absolutism of public law, and the subserviency of private will, and private judgment. One of the present judges now adorning the bench in Westminster Hall, when at the bar, and addressing the House of Lords on the question of disfranchising a borough for corruption, forcibly asked, "What is corruption? If a client were to come to me, and ask me, 'How far may I go to avoid the penalties of bribery?' I should look to the statute book and say such or such is bribery; but if I am asked what is corruption, I should in my turn demand, What is the tribunal before which it is to be determined? If poor and uneducated artisans are to be your judges, I should have one answer; but if I were told that the question was to be determined by your lordships' house, I should be obliged to have regard to many considerations which a different state of manners, different habits, different modes of thinking, and perhaps a higher standard of morality, would bring to bear upon the decision." It is manifest, then, that the more you travel out of public law, the more you plunge into private judgment, private discretion, and, of necessity, private passions. The grand effort of Freedom is to guard itself against these, and it has no bulwark but the law. An annotator of Blackstone has said, that the greater the *number* of laws, the greater the amount of liberty. A moment's consideration is sufficient to satisfy every man that such must be the fact. If it were possible to provide laws well approved of by a popular, and competent majority, and applicable to every

possible combination of circumstances, freedom would approach very near to perfection. That is not possible. The more you are compelled by the imperfection of human things to depart from public law, and to rely upon private judgment and discretion, the more you depart from the principles of true freedom. A free country therefore is a country of laws. Montesquieu says, "Every created thing—the moral and the physical world—the whole universe—have all their laws. The Creator himself has his laws." We know not whether that which we call Providence is not a system of laws, laid down, and irrevocably established before the worlds, by the omniscient Creator, and governing every moral, as well as every physical event of the minutest character to the end of time. It is not the less Providence, whether the Almighty Being directs events, and consequences, as the antecedents occur, or has from the beginning arranged his scheme so that certain effects shall flow from certain causes, both of which have been foreseen, and ministered to by His laws—for past, present, and future are to him as one indivisible moment. It is at an infinite distance, and by an infinitely imperfect imitation, that social liberty seeks to assure, and define its existence, and its extent, by the arbitrary and omnipotent force of laws. It necessarily follows that, if a citizen's rights are to be governed by laws, a distinction between one law and another, or between their respective applications to one or another set of facts, is absolutely a question of right. It may be said that the distinction is nice, and the reasoning which detects it is subtle. But what is meant by the terms "nicety" and "subtlety" in a distinction? Do they mean anything more than that the intellect is slow to perceive it, and that mental vision is dull to its impressions? But the moment it is seen, and understood, it is as much a division between the rights of one man, and of another, as if they were separated by the broad Atlantic. In the natural world, science has taught us that certain materials will enter into combinations only in certain proportions, and the minutest particle beyond will remain a clearly, palpably, tangibly, separate and distinct substance. If the particle be so small

as to be undiscernible by the naked eye, there it is, as unquestionable, as undeniable in its existence, as if it were a mountain, though it may require the assistance of a lens to make its presence known. It is law by which the whole process and the result are ruled. The arguments complained of—the subtleties ridiculed—the niceties contemned in social laws, are all the triumphs of general liberty. They may, from the imperfection of all human inventions, occasionally tend to particular absurdities, and individual injustice, but the whole is—freedom.

The administrators of the law, therefore, who are sometimes said to pronounce ridiculous decisions, fraught with such minute distinctions; who recognise, for instance, different consequences for one man whose name begins with a vowel, and another whose initial is a consonant, whatever degree of approval may be awarded to their judgment, or however men may differ from them as to the correctness of their conclusions, are at least entitled to the commendation of having exercised their minds in the discovery of a legal rule, and believing that they have found it, of having discarded all private considerations of justice, or injustice, wisdom, or folly, and of yielding themselves to the iron dominion of what has appeared to them to be the law. Pass statutes as you please to remedy these imperfections, they will continually exist; and they must exist as long as law is the supreme sovereign, and those who act under it totally submit themselves to its despotism. Every step out of the way of its arbitrary power is a step in the direction of personal absolutism. The people must choose between the two.

But although for the establishment and support of liberty everything in the community must be subject to laws, it is plain that in a community like ours, with interests so numerous and so complicated, the laws to regulate them must be both numerous and complicated. And then, if the infinite variety of circumstances, capable of an infinity of modifications, which no foresight could anticipate, and specifically provide for, are nevertheless to have no touchstone applied to them but that of the laws that be, the application must be

made by the assistance of man's powers of reason, which at the best are weak and fallible, but which may be oppressive or mischievous, as they may be guided by knavery, or misdirected by ignorance. The higher and the purer the character of those powers, and of the individual who wields them, the more accurate is the decision they evolve, and the more sound the law which they determine; for "Lex est summa ratio," is a true maxim.

Much of what has been said will be found more applicable, after pausing to consider now, whether the amount of the sum sought to be recovered, or the nature of the questions on which the right to it depends, is the true index to the proper court for its adjudication. If you wish to keep as strictly as possible within the real limits of the law, and to trust nothing to the discretion, the judgment, or the feelings of individuals, for the support of your claims, it cannot be doubted that you will approach the nearest to success, by carrying them before tribunals supplied with the greatest amount of education, practice, and experience, and surrounded by the most influential checks. Whether a county court possesses a sufficient supply of those qualities shall be inquired into presently. In the mean time, the question recurs, Does our necessity for them depend upon the sum immediately in dispute? One of the great railway companies was sued in a county court by a carrier for six shillings, alleged to have been overcharged. The point hung upon the construction of the company's acts, and it was one of as great difficulty as was ever carried to the House of Lords. The action was brought by the carrier as an experiment, and if decided in his favour, would lead the way to crowds of other actions for sums under five pounds in the same court, if the company should not yield, and thenceforth abandon the charge. The interest of the company involved was an annual income of more than twenty thousand pounds, and, confident in their right, they would willingly have taken the case to the Supreme Court of Error. The decision was against them, and, right or wrong, they were deprived of twenty thousand pounds a year by the adjudication of a

county court judge. This was a case both in character and amount fitted for the most accurate knowledge of legal principles, and the most extensive experience in their application. Whether "substantial justice" was done or not, may be questionable, but the company believe that they have lost a large income contrary to law, and yet without the law affording them redress. In cases of Marine Insurance, an action must be brought against each underwriter, for each contracts separately for himself to the amount which he subscribes. In practice one action is tried, and the rest abide its event. The sum sought to be recovered in the action is frequently, (in the Marine Insurance clubs more frequently than not) under five pounds. The sum total depending upon its issue is generally of large amount. Mercantile usages, nautical practice, international law, domestic statutes, reported precedents, and learned treatises, combined with great experience, may be all required for the production of a really satisfactory result. Is it a case which ought to be determined by a county court judge? If he do not possess the requisite qualifications, the question can only be answered by first resolving whether it is more advantageous to have such rights settled by the closest possible approximation to the real principles of law, at a larger expence, or, at less cost, to depend upon the common sense, right feeling, and judicial instinct of an individual; in other words, whether or not it is wise to depart so far from law, and be satisfied with personal discretion. Such a departure is, as far as it goes, a departure from freedom.

Is a county court one in which you are likely to find the requisite qualifications for such questions? The premium for accepting its appointment is not that which would allure a barrister in great practice, supposing the business of Westminster Hall to be not much worse than at present. It will be well to consider, in its turn, what would be the consequence of the business of Westminster Hall becoming so trifling as to render a County Court Judgeship a prize in the estimation of the most eminent members of the bar. All things remaining pretty much as they are, the County

Court Judges will be selected from men who have proved failures in practice, and allowing that they are all men who are of competent standing, and have diligently kept up professional reading, and study (which is a very wide concession, where there have been none of the encouragements of success), yet there is perhaps no profession in the world in which practice is more necessary to accommodate the mind for the proper application of principles to the endless variety of cases which occur. But supposing again a man of profound reading, and abundant practice, to be appointed to such a post, every one, at all acquainted with the subject, knows that the attainments originally brought, must be constantly fed and nourished. What temptations has he to seek for, and supply the nutriment? And if they were ever so great, what are his opportunities? As to his temptations, in the provinces his bar is formed of provincial attorneys or their clerks, with the occasional attendance of a provincial counsel. In the metropolitan districts it is not much better, unless the more frequent attendance of counsel, who are rarely seen in any higher court, be indeed an improvement. As to the attorneys who plead before him as advocates, from whatever cause it may arise, it is certainly the fact that those who have been in the habit of constantly taking upon themselves the duties of an advocate are not such as have had much business of importance to occupy them in their proper sphere. Since the passing of the County Court Act this has not been so unexceptionally the case, because attorneys of the highest position found it necessary to attend to all the interests of a regular client, without excluding such as must be pursued in the County Court. But, still those who practise regularly in those courts as advocates are not the persons to afford very strong inducements to the judge to occupy his leisure in maintaining his professional knowledge. What are his opportunities? It is true that the Act permits him to practise anywhere but within the jurisdiction of his own court, as if it were possible for a barrister to retain any practice worth having, which he could only attend to by snatches, and at

intervals. Then, again, look at the general nature of his occupation as a judge, in any point of view. If the cases requiring him to draw upon his legal knowledge and experience are comparatively few, the greater portion of his time is employed in a manner which would weaken the most vigorous intellect, and blunt the acutest discernment. Whatever may be the case in the provinces, in the metropolitan districts, the room is crowded with suitors clothed in filth and rags, who, answering to their names when called on, advance in front of the judge, and plaintiff and defendant, standing by each other's side, and eyeing each other askance, are interrogated by the officer of the court. The sum sued for is perhaps five shillings, and addressing the defendant, he asks, "Do you admit the debt?" The most usual answer is "Yes." "What can you pay a week?" is the next question; whereupon the poor creature enters into a miserable history of his distresses, his want of employment, his sickness or the sickness of his wife and children, and upon the whole story the judge has to bring the powers of his cultivated understanding, of his profound learning, and of his subtle reasonings, to determine whether the weekly instalment shall be twopence or threepence. A mind like Lord Eldon's, subjected to such a duty, would probably torment him through a sleepless night with fearful misgivings of having ordered a penny too much.

A vast proportion of the cases decided in a day by a County Court Judge in the metropolitan districts is such as has been described. But, on the other hand, if the cases which involve great and important questions of law, are to become the majority, it may be pretty confidently anticipated that they cannot be properly argued and considered without pushing out, or, at least, pushing down, numbers of those poor suitors for whom such a court must, in its original conception, have been peculiarly designed. No preaudience is at present given to counsel, and rightly so; for the poor man who cannot afford to purchase legal aid, cannot afford to lose a day's work, and ought not to be put to such a loss by the rules of what should be especially the

poor man's court. But if the important legal cases are to become a much larger proportion than at present, one or other of the interests must suffer. It is impossible to view the daily occupation of the judge in any light, without believing, that, when he shakes the dust of his Court off his feet, he will try to bury everything in it, and about it, in entire forgetfulness; or, if he does not do that, both his waking and his sleeping thoughts must be a jumble of whining complaints and pert argumentations,—of squalor, rags, and wretchedness, with Coke, Hale, and the statute book.

It is therefore denied that a county court affords a satisfactory tribunal for the investigation of great legal questions. Those who took part in the passing of the last Act were sensible of that, and thence in part sprung the suggestion of leaving it to the option of the plaintiff to sue in the County Court or in Westminster Hall. Whilst the Court is on the one hand inefficient as a Court of intricate and complex law, on the other hand, its real efficiency is "curtailed of its fair proportions" by the power vested in, and confined to, one of the litigant parties to reject its assistance. Much of the mistake is attributable to the error of assuming that the sum sought to be recovered is a test of the importance of the cause. Something has been said to demonstrate that fallacy. A few more observations will lead to the conclusion at which it is proposed to arrive.

In estimating the price to be paid to an attorney for his services, some regard ought to be had to their value. In "getting up" (as the phrase is) a cause of importance, there is most frequently required considerable acquaintance with the law of evidence to indicate the kind and degree required, much general knowledge of things to point to the quarter where it is to be found, and a competent knowledge of the law applicable to the particular points on which the cause will hinge. Besides these, there may be required much mercantile or much scientific knowledge, and certainly a mind of sufficient ability, tutored and cultivated to a fair extent. Study, talent, and experience are all to be brought to bear, in addition to great expenditure of time,

and not a little of painful anxiety. To talk of procuring all this by paying for it upon any but a very liberal scale, is to speak of an impossibility or an injustice. Without a liberal reward, it is in the nature of things that the employment must fall into the hands of the mean, the ignorant, and the dishonest. But there is a great number of causes which are mere routine—actions for tradesmen's bills, on bills of exchange and promissory notes, and many others, are either undefended causes, or defended to gain time, or to take the chance of the creditor failing in the proof of a signature, of the performance of work, or the delivery of goods. The whole business is done by the attorney's clerk, and consists of very little more than taking out and delivering processes. What reasonable and liberal-minded attorney can deny that these are proper cases for a cheap court? And how can that be affected by the amount? If, when the debt has reached to fifty pounds, the tradesman ought to have a cheap court, does he alter the whole character and complexion of his claim by every additional pound of sugar added to its amount? It is an everyday occurrence, after very heavy expense has been incurred, to have a claim for large sums of money referred to the single arbitrament of some junior barrister, some architect, engineer, or merchant. Why should not a large class of such cases go in the first instance to the County Court? On behalf of the fair-dealing and true-minded creditor, it is just that there should be that power. On behalf of the hapless debtor, it is wise that that power should be without alternative. Nothing can be more clumsy than the machinery of the present County Courts; but that is detail, into a consideration of which it is not intended to enter. The machinery may be mended. Assuming it to be efficient, is a judgment worth less because it costs less to both the creditor and the debtor? As to the former, let him not have cause to complain that, in obtaining his judgment, he is increasing his risk. As to the latter, do not, by accumulating his liability, augment his difficulties. It is an impolitic system, whatever be the origin of debt, to take away oppor-

tunities of retrievement, and provoke the chance of depriving society of many a useful citizen. But it seems to be thought that if the debt is large, the addition of some twenty pounds in the shape of costs cannot materially alter the debtor's position. It was the last faggot which broke the mule's back.

The following then appear to the writer to be the correct objects, to carry out which the machinery of a County Court should be framed :—to compel thither all claims of whatever extent, which consist merely of matters of account, which require the evidence of parties themselves, or their books, as to the mere proof of items ; to establish which, in a Court of Nisi Prius, a bill of discovery might, under the present system, be first required, but which by the power of examining parties themselves in the County Court would be avoided ; and last, but certainly not least, which would involve no nice questions of law. Whether it is advisable that personal execution for debt should be in the discretion of the creditor at all, or only within certain limits, is matter for much doubt and argument on both sides. It is not intended to discuss it here ; it might be a question of detail.

The last observations have been directed to cases of contract. Some actions of tort—such, for instance, as actions of assault, and some cases of trespass—may oppose more difficulty. In many of those cases the amount is more frequently a correct test to determine what Court ought to have the power of adjudication. They, however, are too often the rotten materials out of which a case for costs is manufactured. This appears to have been the fact in all times, and early statutes have been passed for the purpose of restraining them, by abridging the right to costs. They have been long, and long known as, " attorneys' actions." The interview between Hudibras and the lawyer, whom the former went to consult, is known to every reader.

> Quoth he, There is one Sidrophel,
> Whom I have cudgelled.—Very well,
> And now he brags t' have beaten me.—
> Better and better still, quoth he.

And vows to stick me to a wall,
Where'er he meets me.—Best of all,
* * * * * *
Sir, quoth the lawyer, not to flatter ye,
You have as good and fair a battery
As heart can wish, and need not shame
The proudest man alive to claim.
For if they 've used you as you say,
Marry, quoth I, God give you joy:
I would it were my case, I'd give
More than I'll say or you'll believe.

But there are cases which, from their enormity, may, even for the sake of example, require the most solemn investigation, and the best judicial direction; and it seems, to the writer of these pages that the statutes which have been passed, vesting in the judge who tries the cause the power of certifying as to costs, afford an ample safeguard in actions of that description. At the same time, to avoid the predicament in which a plaintiff may be placed in respect of that certificate, there ought to be a power to bring his action in an inferior Court. Indeed, the earlier statutes, intended in certain instances to restrain such actions, were founded, and have been construed, upon the supposition that a sufficient remedy might be obtained elsewhere. It is the opinion of the writer of these observations, that those are cases in which the sum sought to be recovered may afford a proper guide to the Court where it is to be claimed, coupled with suitable powers to the higher Court to determine by its certificate, in the all important matter of costs, whether it is justly brought before that tribunal.

But these observations would fall short of much of their design, were consideration not given to the consequences likely to ensue from the present County Courts, if some of the prognostics concerning them should be realized. That the great law business of the country will in no great length of time flow into those Courts, that forensic eminence will be distributed amongst a provincial bar, and that a County Court judgeship will be amongst the great prizes of the profession, whilst the judges of Westminster Hall, forming a Court of

Appeal, will be few in number, and with little employment, have been confidently predicted. The prophecy is a bold one, and not fortified by history. Courts of as extensive jurisdiction existed before, had as good judges as many who have been called to preside over the new County Courts, and have fallen into desuetude. If the past gives any true token of the future, it may be reasonably foreseen that the County Courts, as at present constituted, will attract attention for a time, dismiss litigants dissatisfied, and sink into disuse. But if those other forebodings should be verified, it is matter of curious speculation where the judges of Westminster Hall, who are to form the Court of Appeal, after the present generation are passed away, are to come from; what are to be their qualifications, and in what holes or corners those qualifications are to be picked up. Where is to be the "legal atmosphere" which it appears to have been Lord Coke's opinion a man should breathe for twenty years, before, even in his time, a lawyer could be thoroughly matured? "If law," says Sir William Jones, "were nothing more than a collection of statutes and decisions, then he would be the best lawyer who had the best natural or artificial memory." But if it is much more than that; if, in truth, it comprises the application of principles, by the operations of reason; and if it is of paramount importance that those principles should be general, and their application universal; that law should not be one thing in one county, another thing in another, and something quite unexpected and wholly different from either when it is finally sought for in the Court of Appeal, there can be only hope of nearly attaining that desired end through the medium of a great central exchange. Unless we could bring the unerring powers of an Almighty Architect into operation in the formation of any of our designs, we cannot secure perfect uniformity and undeviating certainty. But certainty is nevertheless to be aimed at, however short we may fall of its attainment; and certainty in law is to be coveted, both for those who have to support claims and those who have to resist oppression. Certainty should be diligently looked for, earnestly provided for, and fervently regarded in

all our efforts of legislation or decision. "And even things without life giving sound, whether pipe or harp, except they give a distinction in the sound, how shall it be known what is piped or harped? For if the trumpet give an uncertain sound, who shall prepare himself to the battle?"

It is perhaps not singular that the lovers of change, who have of late endeavoured to centralize all which for ages has been scattered over the country, should seek to scatter over the country all which has been long centralized.

What may be the consequence to the character of the bar is a matter in which the public are much more intereste than many may imagine. Much more of the clear outline, sound foundation, and impregnable battlements of our liberty have been defined, and stablished, and erected by English lawyers than any other section of the people. Magna Charta was for the most part only declaratory of "the principall grounds of the fundamentall laws of England, and for the residue it was additionall to supply some defects of the common law." And, in the framing of that charta libertatum regni, Hubert de Burgo, then Chief Justice of England, unquestionably had the chief hand, although he afterwards, for the purpose of ingratiating himself with the monarch, gave advice for the purpose of destroying it. But the statute which he aided remains intact, and the merits of his early patriotism could not shield him from the consequences of his subsequent corruption. And it is worthy of remark that, so well understood was the supremacy of law, that Hubert de Burgo did not dare to counsel the King to trample upon Magna Charta by any supposed prerogative or despotic right. He advised that the statute was void in law; first, because that of King John was obtained under duress, and that of Henry III., which was a confirmation and enlargement of the former, was granted when the King was under age; reasons which (be they good or bad in the particular case) are well-known legal reasons, and have great operation where they are applicable. It is also curious to observe the perfect one-mindedness of Lord Coke in his comments on these transactions. It never occurs to him that the King

could have contemplated for one moment repudiating his subjection to the law, but he points out the fallacies of the corrupt Chief Justice, in the legal pretences advanced for the purpose of evading that law. He regards the whole as a piece of mechanism, of which the King is a portion, subject to the same rigid rules which govern and keep in action the whole machine; and he examines and pronounces an opinion upon the results of certain movements precisely as a philosopher would agree with or differ from another upon the effects of any particular mode of constructing a steam-engine.

Those famous statutes of Edward I., on account whereof Lord Coke says, that that King "may well be called our Justinian," and in which, amongst many technicalities of a private application, there is so much tending to public liberty, were the work of English lawyers, authorized and supported by the monarch, and are little more than improvements of what is to be found in Glanville and Bracton, Britton and Fleta; in fact, the works under the two latter names formed the foundation of much of those statutes. The Petition of Right, another Magna Charta, but much more valuable, because more full, precise, and definite, was framed by Lord Coke. How much of genuine freedom would have been preserved at the Revolution but for such minds as that of Lord Somers, may be food for conjecture. But it is idle to go on enumerating names and collecting instances, as it may be said at once that the history of our constitution is a history of Westminster Hall; and the progress of our liberties is to be traced through the biographies of lawyers. Patriots may have fought, and martyrs may have perished; but it would only have been for an abstract sense of right, and an indistinct idea of justice, if there had not been workmen of equal courage and greater skill to give to those impulses a bodily form and substance.

It may indeed be said that arbitrary monarchs have found amongst lawyers the worst and most dangerous engines of their tyranny; and it is true. That same Hubert de Burgo, who first materially assisted in the structure of Magna

Charta and afterwards lent himself to pull it down, is a flagrant instance. It is also true, that for the very purpose of preventing the recurrence of such examples, the Bar has since the Revolution, by little and little, woven a scheme of discipline, and bound itself by a system of rules, so that their independence may be defended from without and their integrity secured within. Many of those rules have been ridiculed, and some of them condemned, from an ignorance of their objects and their scope. Take, for example, the rule, which, with some exceptions, forbids a barrister to refuse a brief, and compels him to accept the advocacy of a cause offered to him, though in his own private judgment he may believe it to be unjust.

This is a rule which has excited wonder and indignation, and yet it has been a more powerful instrument of freedom than trial by jury. Like many other things which are misunderstood, it has been maligned by those whom it has protected. In some periods of the bad times referred to, let a man fall under the displeasure of the despotic prince, or powerful noble, and his property, his person, or his life be aimed at through the formal mockery of law; and where was the advocate bold enough to step forward in his defence? or, if such an one were found, mark the cowardly tone and crawling subserviency with which every topic in his client's favour was advanced, and the craven spirit with which points were surrendered, and arguments abandoned! Did a man fall under suspicion, however ill-founded, of having committed some revolting crime, and was popular fury let loose upon his head, and did universal execration track his steps, what advocate would not have shrunk from the chance of sharing his obloquy, by asserting his innocence? To prevent that abandonment of victims to power and prejudice, whether private or popular, originated the rule which now constrains an English advocate to lay aside his own sentiments, and sacrifice his own judgment, and enter the lists on behalf of the man who thinks fit to choose him as a champion. When Erskine, who held a legal appointment under the Prince of Wales, was required

to defend Paine against a charge prosecuted for publishing the book called "The Rights of Man," it is said that Erskine was told, from the Prince, that if he accepted the brief he would lose his place: he was told by the Bar that he *must* accept it, or incur such penalties as would be consequent upon a breach of professional regulations. He accepted it, and lost his place. It is not insinuated that any stronger incentive than duty was requisite to impel Erskine into the course he took; but were such incentive wanting, it is not too much to imagine that the loss of his place would be little punishment, in comparison with passing the rest of his life in the midst of a society, which either would not speak to him at all, or with scorn or coldness. Erskine was afterwards vituperated for prosecuting the author of "The Age of Reason," whom he had defended as the author of the "The Rights of Man." It was the same professional compulsion which made him, in one case the accuser, in the other the defender. Dr. Johnson thought that a barrister had nothing to do with the justice or injustice of his client's cause, and that if he were allowed to refuse a brief because he thought his client wrong, the client might have to go the round of the Bar till he found a barrister whom he could convince of his rights, and that thus the bar, by each individual, might have to try his cause before it came to that tribunal which the constitution had supplied. In truth, the purpose of that rule, so much misappreciated and condemned, has been the establishment of every subject's right to have his case laid fully, manfully, and ably before that judicature which the free institutions of the land have declared shall be his fountain of weal or woe. The constitution has provided a plan, which, without endangering any man's conscience, when that plan is rightly pursued, supplies every requisite for the protection of innocence and the vindication of right. There is a judge to decide upon law—there is a jury to decide upon facts. There is an advocate on one side, whose duty is to put forth the arguments which his legal knowledge, his talents, and his experience suggest to him as being favourable to the side on

which he is engaged. His private opinion of the worth of those arguments is nothing, because he is neither the judge of the facts nor of the law. He is simply the mouthpiece to place before those who are, all the reasons which occur to his mind as favouring the views of his client. There is an advocate on the other side who does the same. The judge, who is the advocate of neither side, determines upon the sufficiency of one or the other set of reasons in all matters of law, and leaves to the jury to determine a similar question on all matters of fact. Can anything be more plain than that, in all this, the great constitutional object would not be attained if any one of the parties to the scheme were permitted to tread out of his province? And can any man believe that there is anything immoral in the advocate lending himself to the perfect working of that scheme, by simply stating arguments for the consideration of another mind? To carry it out in its purity, the advocate ought to be careful in every case to avoid pledging his private opinion. It is true, that when counsel are strongly impressed with the justice of their client's cause, they are apt to be carried away by their fervour, and to throw themselves, their opinions, and their feelings into their language. This properly should never be, and it is contrary, in strictness, to the rules which the Bar have laid down; but in practice it is difficult to avoid, and is rarely productive of mischief, perhaps so in a great measure from the fact that parties, in the very great majority of cases, so contrive to state their case to their counsel, as to enlist his feelings and his zeal in the highest degree in their behalf. In fact, it seldom happens that the advocate believes his client to be in the wrong. And this, after all, is beneficial, for it tends to educe the strongest reasons, put in the best way on both sides, and gives to judge and jury the amplest materials for impartial decision. In the nature of things it will not always have that effect; but if the greatest possible number of arguments, placed before an impartial mind in the most prominent point of view, can be allowed to furnish the best materials of righteous judgment, it must follow that that is

the wisest scheme which will best afford those arguments and that prominency. All this is of a piece with the whole fabric of free and constitutional law. He who would attempt to break one thread of the whole web goes far to introduce a rent which may soon cause the whole to crumble into rags.

The instance which has been adduced of the professional regulations of the bar may lead without impropriety, and not without relevancy to the general subject, to consider that rule a little further; for it has been a source of much misapprehension. Some accusations against individual advocates, within the last few years, have found ready access to scrupulous consciences, and excited great doubts as to the morality of the rule which is now under discussion. Those accusations have been repelled and re-asserted. The present observations do not profess to deal with the right or wrong of either side in those particular instances. They are intended to have respect to general principles, and not to try particular questions of breach or observance. It is then at once asserted, that even if a man under a charge of murder, having first retained the services of an advocate, confesses to him his guilt, it is the duty of the advocate, having received the confession in that capacity, to conceal it, and to exercise his abilities for an acquittal. Many are the principles which lead to that conclusion. There is a certain idea of natural justice which makes us suppose that it must be wrong to screen guilt and to avert merited retribution. Whether the idea be innate or the result of education matters not; it is universal and potent. But, when it eventuates in opinions respecting the active duty of man to man, its direction is sometimes erroneous. There is a Supreme Being to whom all men are accountable; and, however man may escape the punishment of his crimes here, there is a tribunal before which no offences can be concealed, and no retribution escaped. But one of the errors of man is to suppose an earthly bar like God's judgment-seat, and to assume that the vengeance which belongs to the Almighty has been delegated to man. Human institutions are founded upon no such assump-

tions. Civil society depends upon nothing but an implied compact. Man has by nature no power over man, unless it be that which is given to him by superior strength. To protect the weak, and to subserve the interests of the many, are the objects of civil society. As members of that society each man submits himself, life and limb and property, to its regulations and it laws. What right has one man to deprive another of his existence, to cut him off from the opportunities of repentance, or even to curtail one hour of his personal freedom, except by the strict terms of the social compact? Whether the Divine law authorizes a compact by which one man shall have power over another man's life has been much disputed; but without determining that doubt, and assuming for the present purpose that it does, it is at all events the principle of English law, that vengeance is not the object of earthly punishment, but that it is a mere enforcement of the penalty of a broken condition, and that with a view to future prevention. The condition then must first be broken, and the breach must be established agreeably to all the provisions of the compact. And, let our abhorrence of the criminal be what it may, life and liberty, the free air of heaven, and the means and opportunities of penitence are his rights, if he cannot be proved guilty according to the rigid stipulations of that implied bargain into which he is supposed to have entered. It is upon these grounds, if upon no other, that the execution of Charles the First was a murder. There was no compact, express or implied, by which the people had, under any circumstances, power over his life. An English advocate is employed by one whom he even strongly believes to be a murderer—not to protect him from retribution, which no earthly agency can finally avert, but to assert and vindicate those human laws by which that murderer's earthly destiny is to be directed. Not to enter here into any consideration of that alleged rule of Ethics which pronounces the moral incapability of any man to reveal a confidence which would not have been his but upon the stern and inflexible condition that it should not be betrayed, it seems plain that there is no real breach of morality in an advocate exerting his

skill to save the life of a known murderer, provided that no immoral means are used for the occasion.

If the professional rule justified an advocate, when he privately knew his client to be guilty, to avail himself of the dubious aspect of many particulars of the evidence to cast an imputation of guilt on some one whom he must have known to be innocent, the profession of an English advocate would be no profession for a Christian. It has been erroneously asserted that Lord Brougham, in his speech for Queen Caroline, advanced a proposition which supports that doctrine. Lord Brougham did no such thing. Lord Brougham, in the spirit of an English constitutional lawyer, bold and intrepid in the discharge of his professional duty, and adhering to that rule which has given rise to these last remarks, declared that an advocate should regard the interests of his client before the interests of any other man; and, whilst representing his client's person, should disregard the consequences which might flow from the arguments to which his client was fairly entitled. But there is not a word of Lord Brougham's to be found recorded which justifies departing from a line of argument to which alone the client might honestly lay claim, or pursuing a course privately known by the advocate himself to lead to injustice and wrong.

What has been advanced refers exclusively to that which is professionally confided to an advocate previously retained. It must not be understood to apply to cases in which it would be the duty of a person to step forward as a witness. And whilst it is contended that a real criminal can only be justly consigned to punishment by his fellow-creatures, when he is condemned by strict legal rules, it is not meant to keep out of sight the necessity of legal rules being such as to prevent the escape of the guilty. If any particular act is pronounced a crime, the legislature should endeavour to furnish ample means for bringing it home to the offender. Indeed, the very proposition which has been stated, that punishment is intended for prevention, does of itself assume the importance of actual crime meeting with legal detection.

But that does not weaken the argument that, be your legal regulations as stringent as they may, the accused person is still entitled to immunity if he cannot be brought within their predicament. And there is no impropriety in an advocate, however he may in his private feelings detest the criminal, putting forward reasons to show that the client is not within the grasp of the law. You must altogether abandon the provision which invests true innocence with the panoply of the law by the unshackled hands of the advocate, or you must leave no power to the advocate to exercise his own judgment in upholding, or deserting the legal exemptions of those whom he believes to be in fact guilty.

As far as the advocate himself is concerned, the morality, or immorality, of his conduct in the defence depends upon the mode in which he performs his duty. And of that mode the whole collective body of the bar takes cognizance. If he exceeds his duty, or falls short of it; if he shrinks from supporting innocence, or transgresses in defending guilt; if, for the purpose of gaining applause, or acquiring reputation, or multiplying employment, he passes the boundary of legitimate argument to "shield the guilty and to varnish crime," or, from dread of the influences of power, or popularity, he forsakes the cause of the injured or the oppressed, —the bar has its private tribunals before which the delinquency is denounced, and the offender punished.

All this may appear an unnecessary diversion from our subject, but it is not. A particular rule of discipline laid down, and enforced by the English bar, was incidentally cited as an example of their efforts for liberty; and all which has been said consequent upon that, has been for the purpose of showing that that rule was not justly open to the objections which have been advanced by hasty and unthinking persons. It would be easy to pursue this portion of the subject further; but that task, as well as the task of adverting to other rules of the bar, instituted for the preservation of their purity and independence, must be foregone, or the main design of these observations will be hidden and lost under its branches.

If it be true, that the nation owes much to the discipline to which the bar subjects its members; and if it be also true, as may fairly be alleged, that the sound learning, spotless integrity, and unflinching impartiality of the judges in our times are attributable partly to their own previous training, and partly to the independence of the advocates who plead before them, to fritter that bar into pieces, and distribute it over the country in shreds, and patches, without any connecting tie by which its discipline shall be preserved in its integrity and power, would surely be a great national evil. And really if the anticipations of some men are well founded, such a state of things is in store. Is it prudent that the law, both as an institution and a profession, should be thus broken into fragments? Is the old Saxon oak, whose roots clung to the ground in spite of the Norman plough—which survived the stormy days of the house of Stuart—which has been, for century after century, gathering strength, and now spreads, far and wide, its umbrageous arms, at once an ornament and a shelter to the land,—is it to be pulled up and hewn into hedge-stakes?

After the treaty of Paris, in 1763, the commercial relations of this country received a great impulse. Questions of a novel character, springing out of a new state of mercantile intercourse, suddenly arose. For the solution of many of those questions there were few, if any, statutes. Legal principles had to be resorted to, and minds well trained, and practised in legal learning, to be engaged in their application. Every man in Westminster Hall knows that those questions frequently arose, and must ever arise, in respect of sums small in the particular instance, but involving in their result interests of unbounded magnitude. What if the present County Courts had been established some half a century previous to that period, and the expectations now entertained by many of the absorbing effects of those Courts had then obtained their full fruition? Should we have had to extract that great commercial code which now regulates the vast affairs of this mighty empire from the repertories of the County Courts? Can it be said that

the present County Courts are constituted at a time when no more questions of intricacy, requiring profound knowledge and extensive experience, are likely to be started? That all has been decided and established, and is now ready-made material in the hands of the County Court Judge? It may be so: but when we reflect that railways, steam, the electric telegraph, and new dctrines of trade promise to work within the next fifty years a greater change upon the whole face, and throughout every relation of national and social existence than has been previously wrought during a course of centuries, they are not unreasonable, who think that it would have been safer and wiser to postpone this great experiment.

The County Courts Acts, clothed in the specious garb of cheap law, have led men to forget high and inestimable benefits. They have put out of sight all the precious ingredients of a free state. The true end and aim of law have been altogether obscured. It has been supposed that avoiding niceties, and repressing subtleties, are the surest way to obtain justice: and that Courts of little expense, though composed of little learning, are the best avenues to happiness and liberty. It has been believed that we have been all along threading our path through narrow and rugged defiles, when we might have chosen an open common. It has been imagined that we have put fetters on our limbs, when we might have indued ourselves with wings.

The object of these pages has been to bring into consideration many of those subjects which should be well pondered, and many of those influences for good or evil which should be steadily regarded, in legislation so important as that of the County Courts Acts. In one point of view, those Acts are imperfect in respect of their limits, and the optional character of their enactments. But viewed in another light, and having reference to the vast interest which the community has in the preservation of legal learning, of legal accuracy, of judicial eminence, and of forensic integrity and independence, without that option, their injuriousness, notwithstanding their limits, would be

incalculable. Thus they are shorn of their utility, whilst pared of their mischief. If these observations have, to any fair extent, been just, the new County Courts are amongst the greatest blunders of the day. Either the expectations of one set of men will be realized, and the last statute will fall a dead letter; or the anticipations of another, and a thinking and intelligent class, will be consummated, and, if not we, at least our children, will be doomed to have their great commercial, and, it may be, constitutional rights, determined by petty *juges de pays*, whose legal knowledge will have been derived from worthless schools, without the means of discipline, because without any general and common bond, and from whose ignorance or misjudgment there will be no appeal, except to judges of necessity chosen from a body like themselves. The very expression "sound law" will then become a forgotten term. Why should men wear themselves in exploring, with painful perseverance, the deep and difficult mine, to obtain an ore, which will have no higher estimate in the traffic which employs their lives than the dross washed down into the valley by the river in its course, and thrown upon its brink, to be picked up at leisure by any idle loiterer upon its banks? Should such a time ever come, the seed will have been sown from which will spring that very vagueness, and that very uncertainty in legal and constitutional principles, which have prevented other nations, with all their efforts, and all their struggles, and all their sacrifices, from attaining true liberty. Should that time ever come to us, then the day will have arrived when it may be said that the vine and the fig-tree will be laid low, and men will seek, though seek in vain, to gather grapes from thorns and figs from thistles.

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